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16

17 UNITED STATES DISTRICT COURT

18 FOR THE CENTRAL DISTRICT OF CALIFORNIA

19 UNITED STATES OF AMERICA,

20 Plaintiff,

21 v.

22 DAVID GILBERT SAFFRON,

23 Defendant.

No. CR 22-276-DSF

GOVERNMENT'S SECOND REQUEST FOR  
JUDICIAL INQUIRY REGARDING  
POTENTIAL CONFLICTS OF INTEREST;  
DECLARATION OF SPECIAL AGENT  
MARISSA JERRY

Hearing Date: January 9, 2023  
Hearing Time: 8:30 am  
Location: Courtroom of the Hon.  
Dale S. Fischer

26  
27 The United States of America, by and through its counsel of  
28 record, the United States Attorney for the Central District of

1 California, the Chief of the Fraud Section of the Criminal Division  
2 of the United States Department of Justice, Assistant United States  
3 Attorney James C. Hughes, and Trial Attorneys Kevin Lowell and  
4 Theodore M. Kneller, hereby files its second request for a judicial  
5 inquiry regarding potential conflicts of interest raised by the  
6 representation of defendant David Gilbert Saffron by defense counsel  
7 Brad Lee Axelrod.

8 This request is for a judicial inquiry of conflicts and to  
9 inquire on the status of defendant's efforts to obtain new counsel  
10 is based upon the attached memorandum of points and authorities, the  
11 files and records in this case, and such further evidence and  
12 argument as the Court may permit.

13 Dated: December 16, 2022

Respectfully submitted,  
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United States Attorney

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16 Assistant United States Attorney  
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17 GLENN S. LEON  
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20  
21 /s/  
THEODORE M. KNELLER  
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24 JAMES C. HUGHES  
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26 Attorneys for Plaintiff  
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28

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

The government requests a hearing for the Court to (1) conduct a judicial inquiry concerning potential conflicts of interest regarding Brad Lee Axelrod's representation of defendant David Gilbert Saffron ("defendant") in this case, and (2) inquire on the status of defendant's efforts to obtain new counsel as he represented to the Court on October 24, 2022.

On October 24, 2022, the Court held a hearing on defendant's motion for Terree Bowers and Malcolm McNeil of ArentFox Schiff LLP to withdraw as defendant's attorneys in this case. (Dkt. 35.) Prior to the hearing, the government filed under seal a Request for Judicial Inquiry Regarding Potential Conflicts of Interest ("Request for Conflicts Inquiry") regarding defendant's other attorney of record in this case, Brad Lee Axelrod. (Dkt. 41.) The Request for Conflicts Inquiry states the government's position and the factual and legal basis for that request. (See id.)

At the October 24 hearing, the Court ordered that ArentFox Schiff LLP "will remain as counsel for the sole purpose of advising [defendant] whether to waive any potential conflict as to Mr. Axelrod." (Dkt. 42.) The Court ordered that "a written waiver must be filed" if defendant wishes to waive the conflict. (Id.) To date, no written waiver has been filed.

The government asked Mr. Axelrod and Mr. Bowers about Axelrod's status in this case and the waiver of conflicts. Mr. Axelrod has not responded to the government's status request and has not been in contact with the government since November 7, 2022. On December 8, 2022, Mr. Bowers represented that he had sent a waiver and an email

1 of explanation to defendant and asked defendant whether he needed  
2 more information. Mr. Bowers reported he had not received a  
3 response from defendant, but Bowers would contact defendant again on  
4 the following day. Mr. Bowers has not reported any further updates  
5 to the government.

6 At the October 24 hearing, Axelrod represented that he intended  
7 to remain as counsel for defendant until defendant could retain new  
8 criminal counsel, and Axelrod agreed to get a written waiver from  
9 defendant. As of this filing, no new counsel for defendant have  
10 entered an appearance. The government does not know whether Mr.  
11 Axelrod obtained a waiver, or whether he intends to remain as  
12 counsel for defendant in this case.

## 13 **II. BACKGROUND**

14 For the reasons set forth in the government's Request for  
15 Conflicts Inquiry (Dkt. 41), the government's position is that Mr.  
16 Axelrod's representation of defendant implicates Sixth Amendment  
17 concerns of the right to effective assistance of counsel. The trial  
18 date is currently set for February 7, 2023, and the government is  
19 unaware of whom, if anyone, currently represents defendant in this  
20 case.

### 21 **A. Despite the Government's Attempts, Discovery Has Not Been** 22 **Produced to Defendant**

23 The government disclosed to the Court in its October 17, 2022  
24 filing (Dkt. 41) that the government attempted to comply with its  
25 discovery obligations and made an initial discovery production to  
26 Mr. Bowers on September 22, 2022. Mr. Bowers returned the materials  
27 on September 23, 2022 and informed the government that he could not  
28 accept discovery on behalf of defendant. (Id.)

1 As of the October 24 hearing, the government had not attempted  
2 to produce discovery to Mr. Axelrod because he informed the  
3 government on September 6 that he was merely assisting lead counsel.  
4 (Id.) Mr. Axelrod did not respond to the government's subsequent  
5 inquiries in September and October 2022 regarding whether he  
6 intended to continue to represent defendant. (Id.)

7 Following the October 24 hearing, while negotiating the return  
8 of defendant's phone from the government, Mr. Axelrod also requested  
9 that the government produce discovery to him on behalf of defendant.  
10 The undersigned attorney for the government informed Mr. Axelrod  
11 that, given the Court's order at the October 24 hearing, the  
12 government needed Mr. Axelrod to represent whether he had received a  
13 written conflicts waiver from defendant before the government could  
14 consider his request to receive discovery on defendant's behalf. As  
15 of this filing, Mr. Axelrod has not responded to the government's  
16 request.

17 **B. The Government Has Repeatedly Attempted to Provide Access**  
18 **to Information or Funds Accessible Through Defendant's**  
19 **Phone, But Defendant Has Not Accepted the Government's**  
20 **Offers**

21 At the October 24 hearing, at defendant's request, the Court  
22 inquired about the status of the return of defendant's phone.  
23 Defendant represented that he needed access to the phone to retrieve  
24 contact information, and the contacts would lend him money to pay  
25 for his legal defense.<sup>1</sup> The government currently has custody of the  
26 phone and is authorized pursuant to a not-yet-executed warrant to

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27 <sup>1</sup> Undated letter from David Saffron to Hon. Dale S. Fischer and  
28 Hon. John D. Early, at ¶ 3. (The Court addressed the letter at the  
October 24, 2022 hearing.)

1 seize "any and all virtual currency<sup>2</sup> stored on, or accessible from"  
2 defendant's phone.<sup>3</sup> To date, no virtual currency or funds have been  
3 seized from defendant's phone, and portions of the phone that  
4 provide access to virtual currency remain inaccessible to the  
5 government.

6 Following the hearing, the government negotiated with Mr.  
7 Axelrod regarding access to defendant's phone. The government  
8 offered to (1) allow defendant to retrieve the contact information  
9 he described in his letter to the Court from the phone in the  
10 presence of an officer from the Pretrial Service Agency (PSA), and  
11 PSA would retain possession of the phone; or (2) return the phone to  
12 defendant after defendant permitted PSA to install monitoring  
13 software on the phone in accordance with defendant's conditions of  
14 release. (See Dkt. 13.)

15 Mr. Axelrod stated that these conditions were unacceptable and  
16 demanded the government return defendant's phone to Mr. Axelrod "per  
17 the judge's order that the mobile phone was to be returned to  
18 [defendant] without any conditions, and, that I was allowed to pick  
19 it up for my client who need not be present."<sup>4</sup> Mr. Axelrod explained  
20 that he would "hand the phone to [defendant] who would then retrieve  
21 the 2factor authorization from the phone which [defendant] explained

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22 <sup>2</sup> "Virtual currency" or cryptocurrency is a digital currency.  
23 Transactions are typically verified, and records are maintained, by  
24 a decentralized system using cryptography, rather than a centralized  
25 authority such as a bank or government. Like traditional currencies  
26 issued by governments, there are multiple types of virtual  
27 currencies, such as Bitcoin.

28 <sup>3</sup> In the Matter of the Seizure of Virtual Currency Stored on, or  
Accessible From the Subject Device, 2:22-MJ-03024 (C.D.C.A. Aug. 3,  
2022) (Stevenson, Mag. J.).

<sup>4</sup> Email from Brad Lee Axelrod to Theodore M. Kneller (Oct. 26,  
2022).

1 to the judge why he needed it to work and to pay defense counsel  
2 ....” (Id.)

3 The undersigned informed Mr. Axelrod that the government  
4 (1) disagreed with his characterization of the Court’s order from  
5 the October 24 hearing, and (2) would order a transcript of the  
6 October 24 hearing to facilitate the parties coming to a common  
7 understanding of the Court’s order. In addition, the government  
8 understood based on representations in August 2022 from Cris  
9 Armenta, another attorney for defendant, that defendant used a two-  
10 factor authentication<sup>5</sup> to access virtual currency through his phone.  
11 Because the government has a valid seizure warrant for any virtual  
12 currency stored on, or accessible from, defendant’s phone, the  
13 government renewed its offer to defendant through Mr. Axelrod that  
14 the parties enter a return-of-funds agreement, which Mr. Bowers had  
15 negotiated with the government in August 2022.

16 The government’s offer required defendant to provide access to  
17 any and all virtual currency accessible through the phone, including  
18 through the two-factor authentication mentioned by defendant’s  
19 attorneys Ms. Armenta and Mr. Axelrod, and then the government would  
20 seize the virtual currency. The government also agreed to return a  
21 pre-agreed amount of the virtual currency to a designated attorney  
22 for defendant to pay for defendant’s legal defense costs in this  
23 case. This is the same offer that the government made to defendant  
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25 <sup>5</sup> Two-factor authentication is used to increase electronic data  
26 security. It is a method of electronic authentication in which a  
27 user is granted access to a website or application only after  
28 successfully presenting two pieces of evidence (or factors) to show  
that the person accessing the data is an authorized user. Receiving  
a unique code via text message to a previously approved cell phone  
number is a common form of a two-factor authentication method.

1 through Mr. Bowers in August and September 2022. Mr. Axelrod has  
 2 not responded to the government's offer made on November 8, 2022.

### 3 **III. LEGAL AUTHORITIES AND BASIS FOR REQUESTED RELIEF**

4 The government renews its basis for relief based on legal  
 5 authority that is put forth in the government's Request for  
 6 Conflicts Inquiry. (Dkt. 41.) In sum, the government's position is  
 7 that Mr. Axelrod's representation of defendant is an actual conflict  
 8 of interest and implicates Sixth Amendment concerns of the right to  
 9 effective assistance of counsel. A judicial inquiry is called for  
 10 because federal courts have an "independent interest in ensuring  
 11 that criminal trials are conducted within the ethical standards of  
 12 the profession and that legal proceedings appear fair to all who  
 13 observe them." Wheat v. United States, 486 U.S. 153, 160 (1988).  
 14 The Sixth Amendment guarantees effective assistance of counsel that  
 15 is comprised of "two correlative rights: the right to reasonably  
 16 competent counsel and the right to counsel's undivided loyalty."  
 17 Fitzpatrick v. McCormick, 869 F.2d 1247, 1251 (9th Cir. 1989).

18 In addition, a lawyer who is a witness to material facts  
 19 concerning the case may not "act as an advocate in a trial in which  
 20 the lawyer is likely to be a witness unless ... the lawyer has  
 21 obtained written consent from the client...." CRPC 3.7(a)(3).  
 22 Notwithstanding a client's informed written consent, the Court  
 23 retains discretion "to take action, up to and including  
 24 disqualification of a lawyer who seeks to both testify and serve as  
 25 an advocate, to protect the trier of fact from being misled or the  
 26 opposing party being prejudiced." CRPC 3.7, cmt. 3, citing Lyle v.  
 27 Superior Court, 175 Cal. Rptr. 918, 926 (Cal. Ct. App. 1981).

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1       **IV. CONCLUSION**

2           For the foregoing reasons, the government respectfully requests  
3 that the Court conduct a judicial inquiry into any potential or  
4 actual conflicts of interest that may arise in Mr. Axelrod's  
5 representation of defendant, including whether Mr. Axelrod has fully  
6 disclosed the conflicts of interest to defendant, and whether  
7 defendant has provided a written waiver. The government also  
8 requests that the Court inquire on the status of defendant's efforts  
9 to obtain new counsel.